

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|-----------------------------------|---|-------------------------------|
| DAVID O. SIKES, Deceased |) | |
| |) | |
| VS. |) | |
| |) | Docket Nos. 256,525 & 256,526 |
| DUNHILL TEMPORARY SERVICES |) | |
| and A & C ENTERPRISES |) | |
| Respondents |) | |
| AND |) | |
| |) | |
| HARTFORD |) | |
| Insurance Carrier |) | |
| AND |) | |
| |) | |
| WORKERS COMPENSATION FUND |) | |

ORDER

The insurance carrier Hartford appealed the May 28, 2002 Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on December 20, 2002, in Wichita, Kansas.

APPEARANCES

David H. Farris of Wichita, Kansas, appeared for Therese Alley and her three children, Heather, Allison and Timothy Sikes. Craig D. Cox of Halstead, Kansas, appeared for Amy Mayfield Sikes and her son, Donovan Sikes. Kendall R. Cunningham of Wichita, Kansas, appeared for Dunhill Temporary Services. Lyndon W. Vix of Wichita, Kansas, appeared for A & C Enterprises. Richard J. Libby of Wichita, Kansas, appeared for Hartford. And finally, E.L. Lee Kinch of Wichita, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

David O. Sikes died on November 15, 1997, as the result of injuries that he sustained two days earlier while performing work for A & C Enterprises (A & C). At the time of the accident, A & C had entered into a "payroll transfer" arrangement with Dunhill Temporary Services (Dunhill), an employment agency. Under that arrangement, Dunhill was responsible for determining if individuals could be hired to work for A & C, for maintaining A & C's employment records, for paying A & C's employees, and for withholding and paying all payroll taxes. In addition, Dunhill was responsible for providing unemployment insurance and workers compensation insurance coverage.

In June 2000, Amy Mayfield Sikes filed two applications for hearing with the Division of Workers Compensation. In one application, Ms. Sikes named A & C as the employer. In the other application, Ms. Sikes named Dunhill as the employer. The Division of Workers Compensation assigned docket numbers 256,525 and 256,526 to those claims, which were litigated together.

In the May 28, 2002 Award, the Judge determined Mr. Sikes was an employee of both A & C and Dunhill on the date of accident under these facts and, consequently, Hartford was responsible for paying the workers compensation benefits to the decedent's representatives. For the portion of the award that went to the minor children, the Judge allocated one-fourth to each child. For the benefits that went to the surviving spouse, the Judge allocated one-third to Theresse Alley and two-thirds to Amy Mayfield Sikes. The division of benefits ordered by the Judge conformed with the stipulation that Theresse Alley and Amy Mayfield Sikes entered into and filed with the Division of Workers Compensation on February 22, 2002.¹

Hartford contends the Judge erred. The insurance carrier argues the decedent was not an employee of Dunhill and, therefore, it has no liability in this claim. In the alternative, the insurance carrier argues A & C and Dunhill should be held jointly liable if the decedent was an employee of both companies on the date of accident. Moreover, at oral argument before the Board, Hartford objected to the Judge apportioning the surviving spouse's benefits. Hartford contends those benefits should be paid to Amy Mayfield Sikes, leaving Ms. Sikes responsible for paying Ms. Alley her one-third share. Accordingly, Hartford requests the Board to find that the decedent was an employee of A & C rather than Dunhill and assess the award against either A & C or the Workers Compensation Fund, if A & C is unable to pay the award. In the alternative, Hartford requests the Board to find that Dunhill and A & C are jointly liable in these claims.

¹ Theresse Alley abandoned her claim to receive benefits in her own right. Consequently, the spousal benefits awarded are based on the rights of Amy Mayfield Sikes.

More importantly, at oral argument before the Board, Hartford announced that it was not denying coverage if the Board determined the decedent was Dunhill's employee on the date of accident.

A & C argues Dunhill was the decedent's employer on the date of accident and that Hartford should be estopped from denying coverage. In the alternative, A & C also argues that on the date of accident it was a sole proprietorship owned by Kent W. Jost, who is financially unable to pay workers compensation benefits. Therefore, any benefits for which Mr. Jost or A & C is responsible must be paid by the Workers Compensation Fund. Moreover, in its brief to the Board, A & C requests the Board to clarify the award by assessing all the administrative expenses against Hartford and to affirm the Judge's finding that Hartford was responsible for the benefits due in these claims.

Dunhill argues that it accepted the decedent as an employee and that it paid an insurance premium to Hartford for workers compensation insurance coverage. Accordingly, Dunhill argues Hartford should be responsible for the death benefits in these claims. In the alternative, Dunhill also argues Hartford should be estopped from denying that the decedent was covered by the insurance policy because Hartford allegedly began investigating this claim without advising Dunhill the investigation was directed to determining whether there were coverage issues. Accordingly, Dunhill requests the Board to affirm the May 28, 2002 Award.

Amy Mayfield Sikes requests the Board to adopt the findings and conclusions of the Judge and to affirm the Award.

Likewise, Therese Alley requests the Board to affirm the Award.

Finally, the Workers Compensation Fund concurs with A & C and Dunhill and, accordingly, requests the Board to affirm the Award in every respect, except the Board should assess all the administrative expenses against Hartford.

Based upon the briefs and the statements made at oral argument before the Board, the issues on this appeal are:

1. Was the decedent an employee of Dunhill, A & C, or both on the date of accident?
2. Which party (or parties) is (or are) liable for the workers compensation benefits payable in these claims?
3. Should the stipulation or agreement that Therese Alley receive one-third of the surviving spouse's benefits due Amy Mayfield Sikes be incorporated into the award?

4. Who should be assessed the administrative costs incurred in these claims?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments and authorities, the Board finds and concludes:

I. Was the decedent an employee of Dunhill, A & C, or both on the date of the accident?

As indicated above, the decedent, David O. Sikes, died on November 15, 1997, as the result of injuries that he sustained two days earlier. The Judge determined that at the time of the accident Mr. Sikes was performing work for, and was employed by, both Dunhill and A & C. The Board agrees.

A & C was a sole proprietorship that was formed in 1994 by Kent W. Jost. The company, which was located in Halstead, Kansas, manufactured wooden pallets. When A & C began operations, Mr. Jost contacted Dunhill, which was a temporary employment agency located in Wichita, as he had dealt with Dunhill in his prior job. Rather than trying to find workers who were willing to travel from Wichita, Dunhill suggested that A & C find individuals in the Halstead area whom A & C wanted to use and have those individuals apply for employment with Dunhill. A & C provided Dunhill job application forms to the applicants. Mr. Jost described the dealings with Dunhill, as follows:

I contacted Dunhill when I was ready to start, when I was needing some employees, some help over at A & C. I contacted Dunhill about setting up the same way we had done it when I was with United Refrigerated Services. And we talked about that since the business, A & C was in Halstead, at that point we talked, I talked with the [Dunhill] manager at that time, she told me we could do -- we could sure do that, it would be a little more difficult to find help, that they had applications -- applicants in the Wichita office to send to Halstead to go to work. One thing she suggested doing is find local help in Halstead, put their applications in with Dunhill, that I wanted to hire, put their applications with Dunhill; at that point, then we could use -- they would be actually living in Halstead but could be used through Dunhill temporary services.²

. . . .

And what we'd talked about at that point, I had -- what I was starting to look for getting, when I was getting the need for an employee, some help, I had contacted

² Jost Depo. (Feb. 27, 2001) at 19-20.

Dunhill and had already talked to them and in the conversation about sending Wichita residents out versus local residents. At that point, what they suggested was having the local people, whoever I determined that was going to -- if I was going to put somebody on, to have them fill out a Dunhill application, fill out W-2's *[sic]* through Dunhill. They had a form, they had a couple forms of ID that they required, and then they would process, Dunhill would process the applications, go through that. And at that point, I turned everything over to Dunhill on the employees. So I never actually had applications of my own at all, they were all through Dunhill.³

Although A & C intended to utilize the individuals it referred to Dunhill, Dunhill had the final say in whether that employee was accepted for employment. If the individual had the proper identification, Dunhill accepted the worker as an employee and assigned the worker to A & C. Pursuant to the written agreement between A & C and Dunhill, Dunhill was responsible for the weekly payroll and invoicing, the payroll taxes, workers compensation insurance, unemployment insurance and issuing the W-2's. On the other hand, A & C was responsible for selecting and supervising the workers and for determining their pay. Accordingly, Dunhill issued Dunhill payroll checks to the workers assigned to A & C and withheld the appropriate payroll taxes. Moreover, Dunhill claimed the assigned workers as Dunhill employees for workers compensation insurance coverage and paid premiums to Hartford on the wages paid to those workers. Dunhill also claimed the assigned workers for purposes of unemployment insurance.

Dunhill retained the I-9 and W-4 forms. Accordingly, all the workers referred by A & C were required to go to the Dunhill offices to complete their application process. According to David Shearer, who was Dunhill's vice president during the period in question, A & C had the authority to terminate a worker's employment at A & C but A & C did not have the authority to terminate the worker's relationship with Dunhill as that worker could return to Dunhill and be assigned to a different company or client. Mr. Shearer testified, in part:

Q. (Mr. Cunningham) Very briefly, Mr. Shearer, just to make sure I have got an understanding and the court has an understanding of how payroll transfer employees versus normal temporary employees are treated. If we operate under an assumption that a person as a payroll transfer employee is determined by the company whether they are performing services that they are no longer needed whether it is because of a personnel problem or a layoff or whatever, does that mean that that person is now just gone, they don't work for anybody?

³ *Id.* at 23-24.

A. (David Shearer) No. They can come back into our office and be sent out as a regular temporary, yes.⁴

According to Mr. Shearer, Dunhill retained the right to terminate the workers assigned to A & C.⁵

In June 1997, A & C referred Mr. Sikes to Dunhill for employment. And as part of the employment process, Mr. Sikes completed a Dunhill job application. Immediately above Mr. Sikes' signature, the Dunhill employment application reads, in part:

I hereby authorize you and all former employers, and others given by me as reference to answer all questions and to give all information in connection with this application or in any way concerning me. **I agree, if employed by you**, that if I ever make claims against you for personal injuries, upon your request, I shall submit to examinations by physicians of your selection. **Your employment of me may be terminated by you at any time** without any liability to me except for wages and salary as have been earned by me at the date of such termination.

I understand that if accepted for employment, I will be working for Dunhill on temporary assignments at its clients' offices. It is hereby agreed that I will obtain your permission before discussing permanent employment with a Dunhill Client.

I agree to notify Dunhill as soon as I hear each assignment is terminated. If I fail to give such notice, Dunhill may assume that I am not available for employment. (Emphasis added.)

Dunhill Temporary Systems⁶

Below Mr. Sikes' signature on the job application, the document indicates decedent was being assigned to A & C beginning June 24, 1997, at an initial pay rate of \$6 per hour and that the decedent's time would be billed at \$7.80 per hour.

In 1998, Dunhill, which was incorporated at the time of the accident, was dissolved after the company sold its franchise back to the franchiser. In 1999, Mr. Jost incorporated A & C.

⁴ Shearer Depo. at 80-81.

⁵ *Id.* at 57.

⁶ *Id.*, Ex. 2 at 1.

Kansas has long recognized that for purposes of the Workers Compensation Act a worker can be the employee of more than one employer at the same time. And when an employer lends a worker to another employer, the worker can look to either employer or both for workers compensation benefits.⁷

Where a general employer loans his workman to another and directs him to do certain work which is being done under the supervision and control of such other or special employer, and which work is also a part of the general employer's trade or business in which injuries are compensable under the compensation act, and the workman continues at all times in the employ of the general employer who pays his compensation and who remains vested with full power to discharge him for refusal to do the work for the special employer which he was directed to do, such employee, if injured while engaged in such work, may look to both employers and their respective insurance carriers for compensation.⁸

It is impossible to lay down a rule by which the status of a person performing a service for another can be definitely fixed as an employee, as ordinarily no single feature of the relation is determinative, but all must be considered together and each case must depend on its own peculiar facts. A number of factors have evidentiary value, the most important of which is the degree of control retained by the person for whom the work is being done. In order to determine the actual relationship of the parties under any employment, the courts will look to all the circumstances involved in the particular case.⁹

In addition to holding that no single fact is conclusive in determining the nature of the relationships between the parties in a workers compensation case, the Kansas Supreme Court has also held that an express contract is not required to prove a contract of employment. Instead, the conduct of the parties is sufficient to disclose an agreement between an employer and employee. The Kansas Supreme Court in *Casebeer*¹⁰ stated, in part:

Respondent and his carrier also argue that there was no contract of employment as to claimant's work as a welder and laborer.

⁷ See *Scott v. Altmar, Inc.*, 272 Kan. 1280, 38 P.3d 673 (2002); *Bendure v. Great Lakes Pipe Line Co.*, 199 Kan. 696, 433 P.2d 558 (1967); *Bright v. Bragg*, 175 Kan. 404, 264 P.2d 494 (1953); and *Mendel v. Fort Scott Hydraulic Cement Co.*, 147 Kan. 719, 78 P.2d 868 (1938).

⁸ *Mendel*, 147 Kan. at Syl. ¶ 4.

⁹ *Bendure*, 199 Kan. at 703-704, citing *Mendel*, 147 Kan. at 722.

¹⁰ *Casebeer v. Casebeer*, 199 Kan. 806, 810-811, 433 P.2d 399 (1967) (citations omitted).

In determining the actual relationship of parties under the Workmen's Compensation Act courts do not regard a single fact as conclusive but will look at all the facts and circumstances involved in a particular case. Our Workmen's Compensation Act does not require an express contract to establish its existence, the conduct of the parties being sufficient to disclose an agreement.

Moreover, when a general employer lends an employee to a second employer, the second employer becomes liable for workers compensation benefits only if (1) the employee has made a contract of hire, express or implied, with the second employer, (2) the work being performed is essentially that of the second employer, and (3) the second employer has the right to control the details of the work.¹¹

The decedent was considered a "payroll transfer plan" employee, which in this instance means that Mr. Sikes was referred to Dunhill by Mr. Jost as someone that A & C wished to employ. The only difference between a payroll transfer employee and any other temporary worker that Dunhill assigned to other client companies was that Mr. Sikes had been approved by Mr. Jost as someone he wanted to employ.

Considering all the facts and circumstances, the Board concludes Dunhill, as a temporary employment agency, entered into a contract of employment with the decedent as expressed in the language quoted above from the job application.

Moreover, Dunhill had the final say in determining whether the decedent would work for A & C as it had to approve the documents that he presented for employment. Dunhill retained the authority to terminate the decedent. Furthermore, as the decedent was accepted as a Dunhill employee, Dunhill could immediately assign him to another employer if A & C had determined it no longer desired his services. This is conduct and control that indicates Dunhill accepted the decedent as one of its employees and assigned the decedent to work for A & C.

In short, the decedent was an employee of Dunhill on the date of accident and was performing services that advanced the business interests of Dunhill as a temporary employment agency. Consequently, the decedent's surviving spouse and minor children are entitled to pursue workers compensation benefits from Dunhill and its insurance carrier.

The Board affirms the Judge's finding that claimant was also an employee of Mr. Jost doing business as A & C at the time of the accident. A & C controlled the decedent's day-to-day activities and the details of the work that he performed. Consequently, under the principles set forth in the above-cited cases regarding general and special employers,

¹¹ *Scott*, 38 P.3d at 676-677; *Bendure*, 199 Kan. at Syl. ¶ 5.

A & C borrowed the decedent to advance its business interests and, thus, decedent's surviving spouse and minor children are entitled to pursue workers compensation benefits from Mr. Jost doing business as A & C.

In summary, the Board concludes at the time of the accident the decedent was an employee of both Dunhill and A & C for purposes of the Workers Compensation Act.

II. Which party (or parties) is (or are) responsible for the benefits payable in these claims?

The Board acknowledges Dunhill and A & C contracted that Dunhill was responsible for the workers compensation benefits for those employees who were assigned to A & C. But that is a private contract between Dunhill and A & C that may be enforced in a court of competent jurisdiction. That contract does not restrict the rights of decedent's surviving spouse and minor children to pursue these claims against both employers under the Workers Compensation Act. Consequently, the decedent's surviving spouse and minor children may pursue benefits from both employers, which they have done.

Hartford emphasized at oral argument before the Board that it was not denying or disputing coverage in the event the Board determined the decedent was Dunhill's employee on the date of accident. In addition, the Workers Compensation Fund does not contest that Mr. Jost was financially unable to pay an award of death benefits to the decedent's surviving spouse and minor children and that both Mr. Jost and A & C lacked workers compensation insurance coverage on the date of accident. Accordingly, the Workers Compensation Fund is liable under K.S.A. 44-532a (Furse 1993), which requires the fund to pay benefits when the employer both lacks insurance coverage and is financially unable to pay compensation.

Consequently, the award entered in these claims should be against Dunhill and its insurance carrier, Hartford, Kent W. Jost doing business as A & C, and the Workers Compensation Fund, jointly and severally.

III. Should the agreement that Therese Alley receive one-third of the surviving spouse's benefits due Amy Mayfield Sikes be incorporated into the award?

Hartford objects to the Judge apportioning Amy Mayfield Sikes' surviving spouse's benefits between her and Therese Alley. Hartford acknowledges that Ms. Sikes and Ms. Alley have filed a written stipulation in which the women agreed to share the surviving spouse's benefits, one-third to Ms. Alley and two-thirds to Ms. Sikes. But Hartford did not join into that agreement and the insurance carrier now contends there is no provision under the Workers Compensation Act to incorporate the terms of such an agreement into an

award that would require it to apportion the surviving spouse's benefits into two payments. Conversely, the insurance carrier contends that the surviving spouse's benefits should be awarded to Ms. Sikes alone, leaving Ms. Sikes responsible to make the appropriate division. The Board agrees.

The Board notes that among the various parties only Ms. Alley and Ms. Sikes signed the agreement that divided the surviving spouse's benefits. The Board was unable to find any statute or appellate court case addressing the issue. Consequently, in the absence of an agreement among all the parties and in the absence of legal authority to the contrary, the Board concludes the Division of Workers Compensation does not have the authority to incorporate the agreement between Ms. Alley and Ms. Sikes into the terms of the award. Accordingly, the surviving spouse's benefits should be awarded to Ms. Sikes, leaving her responsible to satisfy the agreement with Ms. Alley.

IV. Who should be assessed the administrative costs incurred in these claims?

As the Board has determined that the decedent was an employee of both Dunhill and A & C on the date of accident, and that those employers are jointly and severally liable for the benefits that are due in these claims, the Board also concludes that those employers, Hartford, and the Workers Compensation Fund are jointly and severally liable for the administrative costs.

AWARD

WHEREFORE, the Board awards the benefits provided in K.S.A. 1997 Supp. 44-510b to Amy Mayfield Sikes, as the decedent's surviving spouse, and to Donovan Sikes, Heather Sikes, Allison Sikes and Timothy Sikes, as the decedent's four wholly dependent children. The award is entered jointly and severally against Dunhill Temporary Services and its insurance carrier, Hartford, Kent W. Jost doing business as A & C Enterprises, and the Workers Compensation Fund, who are to pay the following:

Benefits are awarded for an accidental injury which occurred on November 13, 1997, and are based on an average weekly wage of \$280, for compensation at the rate of \$186.68 per week.

Subject to the provisions below and K.S.A. 1997 Supp. 44-510b, one-half of the weekly compensation payments shall be paid to Amy Mayfield Sikes, the surviving spouse, and one-eighth on behalf of Donovan Sikes, a minor dependent, until he reaches 18 years of age, one-eighth on behalf of Heather Sikes, a minor dependent, until she reaches 18 years of age, one-eighth on behalf of Allison Sikes, a minor dependent, until she reaches 18 years of age and one-eighth on behalf of Timothy Sikes, a minor dependent, until he

reaches 18 years of age. After that date, the minor dependents will continue to receive payment until he or she reaches 23 years of age only if he or she is enrolled as a full-time student in an accredited institution of higher education or vocational education, or if he or she is physically or mentally unable to earn wages in any type of substantial or gainful employment, subject, of course, to the maximum amount of compensation payable, whereupon all rights to benefits terminate.

Should benefits to one minor dependent cease, the entire weekly payment that was otherwise payable to the minor dependent shall be made to the other dependents, if their rights to benefits have not otherwise terminated, all as provided by K.S.A. 1997 Supp. 44-510b.

For the period from November 13, 1997, through January 31, 2003, Amy Mayfield Sikes is entitled to \$93.34 per week for 272.14 weeks for a sum of \$25,401.55, which is currently due and owing less any amounts previously paid. Thereafter, payments will continue at the rate of \$93.34 per week subject to the provisions of K.S.A. 1997 Supp. 44-510b, or until further order of the Director.

For the period from November 13, 1997, through January 31, 2003, there would be due and owing on behalf of Donovan Sikes 272.14 weeks at the rate of \$23.34 per week in the sum of \$6,351.75 for a total amount due and owing of \$6,351.75, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, payments will continue at the rate of \$23.34 per week subject to the provisions of K.S.A. 1997 Supp. 44-510b, or until further order of the Director.

For the period from November 13, 1997, through January 31, 2003, there would be due and owing on behalf of Heather Sikes 272.14 weeks at the rate of \$23.34 per week in the sum of \$6,351.75 for a total amount due and owing of \$6,351.75, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, payments will continue at the rate of \$23.34 per week subject to the provisions of K.S.A. 1997 Supp. 44-510b, or until further order of the Director.

For the period from November 13, 1997, through January 31, 2003, there would be due and owing on behalf of Allison Sikes 272.14 weeks at the rate of \$23.34 per week in the sum of \$6,351.75 for a total amount due and owing of \$6,351.75, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, payments will continue at the rate of \$23.34 per week subject to the provisions of K.S.A. 1997 Supp. 44-510b, or until further order of the Director.

For the period from November 13, 1997, through January 31, 2003, there would be due and owing on behalf of Timothy Sikes 272.14 weeks at the rate of \$23.34 per week in the sum of \$6,351.75 for a total amount due and owing of \$6,351.75, which is ordered

paid in one lump sum less any amounts previously paid. Thereafter, payments will continue at the rate of \$23.34 per week subject to the provisions of K.S.A. 1997 Supp. 44-510b, or until further order of the Director.

Notwithstanding language to the contrary, the maximum amount of compensation payable to decedent's dependents shall not exceed \$200,000 and when such total amount has been paid the liability for any further compensation under K.S.A. 1997 Supp. 44-510b to dependents, other than the minor dependents of the decedent, shall cease, except that the payment of compensation to any minor dependent of the employee shall continue for the period of the child's minority at the weekly rate in effect when the liability is otherwise terminated and shall not be subject to termination until such child becomes 18 years of age, unless K.S.A. 1997 Supp. 44-510b otherwise provides.

The marriage or death of the surviving spouse or the death of any dependent, as well as any other change in circumstances as contemplated by the Act, shall cause the payment and reapportionment of benefits as provided by K.S.A. 1997 Supp. 44-510b.

Funeral expenses are ordered paid up to the maximum sum of \$4,300.

The decedent's reasonable and necessary medical expenses from the November 13, 1997 accident are ordered paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Attorney for Therese Alley and Heather, Allison
and Timothy Sikes
Craig D. Cox, Attorney for Amy Mayfield Sikes and Donovan Sikes
Kendall R. Cunningham, Attorney for Dunhill Temporary Services
Lyndon W. Vix, Attorney for A & C Enterprises
Richard J. Liby, Attorney for Hartford
E.L. Lee Kinch, Attorney for Fund
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation